No. 12370

In the United States
COURT OF APPEALS
for the Ninth Circuit

NORMAN W. MOSHER,

Appellant,

vs.

Diesel Boat FEARLESS, her motor, tackle, apparel, furniture, etc.,

LAURENCE E. TATE and HENRY L. CASTNER, claimants,

Appellees.

BRIEF OF APPELLEES

Upon Appeal from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND

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STATEMENT OF THE CASE

This case is brought upon the basis of a seaman's libel in rem for wages. Wilbert B. Mosher, one of the libelant's assignors, was engaged by the owners to act as master of the FEARLESS upon a fishing venture. Libelant and his remaining assignors were employed by Captain Mosher. The crew came aboard the boat in Portland on November 3, 1948, and commenced work

in getting ready to fish. Thereafter the boat was beset by much mechanical difficulty until shortly after January 1, 1949, when the crew proceded from Astoria to sea to fish. Again engine trouble ensued, and the boat was taken to Westport, Washington. There,on January 10, 1949, the employment agreement was terminated.

A libel in rem was filed against the FEARLESS, and the boat taken into custody of the Court on March 28, 1949. No service of the monition by publication was ever made. Because the claimants were unable to post a stipulation, the cause came on for trial on April 7, 1949.

At the trial libelant contended, as he does in his appeal, that he and his assignors are entitled to wages for the time spent working upon the FEARLESS and for the time spent waiting for repair work to be done on the engines. The claimants contended that the hiring of the crew was on the basis that the boat would be fished on lay shares, so that the crew was not entitled to wages, only a share of the catch.

On April 9, 1949, the Trial Court found for the libelant in the total sum of $288.00 and ordered that the FEARLESS be released from the Marshal's custody unless he was given adequate security. The Marshal then demanded security from the libelant to save the Marshal harmless from any claims or expenses arising while the vessel was in his custody. When such security was not furnished, the Marshal released the FEARLESS from custody.

Thereafter, the claimants tendered to libelant's proctor the full sum awarded by the Court, together with the amount claimed as costs. This tender was refused, and the money was paid into the registry of the Court.

Although Appellant's Assignments of Error (Abs. 42) are seven in number, in his brief (p. 4) appellant states that there is but one broad error. The error charged is that the Court did not award appellant a large enough sum. The only issue therefore on this appeal is whether the evidence supports the Trial Court finding determining the sums due appellant.

ARGUMENT

Point I

Appellant's Assignment of Error.

The point to be borne in mind throughout the consideration of this appeal is that this is not a case of articled seamen but one involving a fishing venture. Historically, men have fished on a lay basis with the boat receiving its share and the captain and crew receiving their share of the catch. If fishing is good, the crew is well paid; if fishing is poor, the returns for both parties are poor. In that sense these fishing boats operate with their crews as joint venturers or partners.

When Captain Mosher was engaged to operate the FEARLESS, it was upon a lay basis as set forth by the Union Agreement—40% of the net receipts from fishing to the boat and 60% to the crew (Tr. 16, 76).

In addition the captain was to be given 10% of the boat's share for his additional services. This is shown by the testimony of Tate (Tr. 131) and Castner (Tr. 175). When libelant first recounted the circumstances of the hiring of the crew, the foregoing was the extent of his testimony (Tr. 16). Later, on rebuttal, for the first time (Tr. 239) he attempted to make out an agreement to pay wages. The same is true of Everett Mosher's statement (Tr. 251, 252). The Trial Court found from this evidence that the crew was "employed to operate the FEARLESS in the fishing trade upon a lay basis, subject to the terms of a working agreement of the Otter Trawlers Union, Local 50, International Fishermen and Allied Workers of America" (Abs. 36, Finding 2).

Appellant's argument seeks to avoid the main purpose of the Union Agreement and the majority of its provisions—which portion sets forth the share basis of the fishing venture.

(1) Appellant contends in Point 1 of his summary (Ap. Brief, 34) that this Union Agreement (Libelant's Ex. 2) requires the payment of $1.50 per hour for any work done after one day by a member of the crew promised a fishing chance, but released without a legitimate cause and without opportunity to fish. In support of this he relies on Clause 11c of the Union Agreement.

This entire paragraph of the Union Agreement should be considered:

"11. The crew is to build and repair the nets during the fishing season and perform such work as is necessary for the upkeep and preservation of the net and gear without compensation. However, if any crew member does not show up to perform all of such work or has not provided any experienced man in his place, he shall be charged $1.50 per hour, which shall be paid to the man taking his place. If there is no man taking his place, then the sum collected from absent member shall be divided equally among the crew members performing the work.

" . . . .

"(c) Any work done on otter trawls after one day by any member promised a fishing chance, who is released without legitimate cause and does not have the opportunity to fish with said otter trawler seine, shall be paid at the rate prescribed above, $1.50 per hour."

This paragraph requires the crew to build, repair and maintain the nets and gear without compensation. If a crew member is released under 11(c), he was to be paid at the rate of $1.50 per hour for work on the *nets and gear* on the *otter trawler*. This clause does not cover any work on the hull or engines but only work on the gear.

There was no agreement, written or oral, that the Moshers were to work on anything but the nets and gear. There was no agreement to compensate them for time spent waiting.

(2) In Point 2 appellant states the beginning dates of the work by libelant and each assignor. This is not disputed.

(3) In Point 3 appellant claims that it is not disputed that claimants discharged the Moshers at Westport January 10, 1949. This is disputed. The facts show that the employment was terminated by mutual consent.

First, when Captain Mosher called Castner he told Castner that "We are through" (Tr. 191). Then, when Tate went to Westport to get the boat, believing the crew was unwilling to continue, he was told by Norman and Everett Mosher that they had figured on taking the boat back to the Columbia River and quitting it (Tr. 149). This is confirmed by the testimony of George Hippert (Tr. 220).

In his brief appellant claims the boat was ready to return to sea at this time, that they were ready to go and that they did not do so solely because they were discharged. If, as they say, the boat was ready to go fishing before Tate arrived, why did the Moshers not go? Why should they wait for Tate unless they were quitting the vessel?

(4) In Point 4 appellant states that none of the Moshers gave the owners any legitimate cause for discharge. As pointed out under (3) above, this employment was terminated by mutual consent. There was no discharge, even though there may have been ample reasons for the owners to discharge the Moshers.

(5) Appellant states in Point 5 that there is no doubt that the Moshers did not get a substantial fishing

chance. This is apparently an effort to show compliance with all of the provisions of Clause 11c of the Union Agreement which reads "does not have an opportunity to fish." Whether or not libelant had an opportunity to fish within the terms of this agreement is not, as appellant agrees, an issue before this Court, although, in fact, the boat did go fishing.

(6) Appellant argues in Point 6 that the Moshers were detained in the service of the boat and gave their whole business time from November 3, 1948, to January 10, 1949. Reverting to the fact that this was a fishing venture, all parties expected all income to come from the proceeds of the sale of the catch. Surely appellant would not claim wages for the time spent waiting because the weather was unsuitable for fishing or because the market price of fish made it unprofitable to go to sea. Then, why should they make a claim for time spent waiting in getting parts and repairing the engines?

As a matter of fact, when the reduction gear broke down, Tate "told them that it would be fine if they could go up town and get a job and work for a while. If the boys could work for a while while the boat was laid up, because we would have no use for them on the boat, because the boat wasn't going anyplace until it was repaired" (Tr. 138). There was nothing which compelled the Moshers to stay on the boat at any time. They could have left at any time (Tr. 166).

(7) Appellant urges that there is no contradiction that their services were worth $1.50 per hour each, with an additional $8.00 per day for Captain Mosher. The testimony of libelant and his assignors on the reasonable value of their services merely stated their opinion of the value. There is no testimony of other wages paid for comparable work and, indeed, no such testimony could have been produced because these fishing boats do not operate on a wage basis but upon a lay basis.

Particularly is it true of the testimony of Captain Mosher. Had there been a going rate for wages for fish boat captains, a man with the experience in fishing of Captain Mosher would have known of it and would have produced it in evidence. Nowhere does Captain Mosher give any basis for his computation of $20.00 per day. It does not appear in any alleged oral or written agreement; it does not appear as the custom of the trade; and it does not appear as a going rate.

From this evidence and from observing the witnesses and their demeanor, the Trial Court concluded that the sum per day of $10.00 to one Mosher, $8.00 to a second and $6.00 to a third was a reasonable sum to be allowed them. This is set forth in Finding No. 7 (Abs. p. 36).

(8) In Point 8 appellant contends that the Moshers actually did each job listed in his brief. There is considerable question and conflict of testimony on what the Moshers actually did do. They testified to a great deal of work on the nets and gear and on the engines. How-

ever, Captain Randall, a witness for the claimants, who heard all of the Moshers' testimony, stated that three men could have done all of the work that was done by the Moshers, or that had to be done, in about seven or eight days (Tr. 214), and Captain Randall has had extensive experience as a fisherman and boat builder.

There is no doubt that the Moshers did work on the fishing equipment. They also did some work in cleaning and freeing deck machinery and cleaning the hull. However, they did little work on the engines. While the boat was at Westerlund's at Portland, the engine work was done by Westerlund and Fairbanks Morse men (Tr. 128, 129). When she was at Ilwaco, the work was done by Elmer Cook, a machinist, and assisted by Tate (Tr. 139). The work at Astoria, getting the engines in final tune, was done by Castner and an experienced mechanic named Rasmussen (Tr. 190, 209).

(9) Appellant claims in his Point 9 that the only issue going to the merits about which there was controversy was whether the Moshers actually worked the time they claimed to work.

The owners testified that when either of them was on the boat all that the Moshers were doing was sitting around talking and drinking coffee (Tr. 151, 165). The Moshers kept no record of their time and kept no log (Tr. 65, 103, 117). Although Captain Mosher said he had a log covering the past twelve years, it was not introduced to substantiate his claim for hours worked (Tr. 103).

Thus, the evidence was not clear as to the time spent by libelant or any assignor. It was all based upon the speculation of the interested parties making the guess (Tr. 54, 97, 110-111, 116, 120). The Trial Court found that the time spent by the Moshers was twelve days and awarded compensation based thereon (Finding No. 7, Abs. 36).

(10) In Point 10 appellant claims as a matter of law that the Moshers are entitled to the full amount of their claimed wages. No authorities are cited on this matter of law. The extent and value of their services to the vessel have been discussed under the foregoing points. From this conflicting evidence, the Trial Court found that the Moshers were entitled to $288.00. They are entitled to no more.

(11) In his concluding Point 11 appellant "thinks" he should recover the amount alleged in his libel, less $197.00 cash advanced. This conclusion was not the conclusion of the trial judge.

Point II

The Court's Findings are supported by ample evidence.

As has been discussed previously the testimony on the value and extent of the Moshers' services was con-

flicting. Because the crew was hired on a lay basis, the owners at the trial and upon this appeal contend that the libelant was entitled to nothing but the crew's share of any catch.

The Trial Court found that the employment was on a lay basis in the fishing trade, subject to the terms of the Union Agreement (Finding No. 2, Abs. 36). This is supported by the testimony of Tate and Castner and even by the Moshers (Tr. 16[illegible], 76, 131, 175).

The Trial Court found that this employment was terminated on January 10, 1949. This also was supported by the testimony of Tate and Castner and confirmed by Hippert (Tr. 149, 191, 220).

In fact the only finding appellant objects to is No. 7 which states the number of days worked and the amount of the compensation. This was in the sum of $288.00. This sum was arrived at by taking into consideration the groceries furnished the crew by the owners (Tr. 228), the cash advances made (Tr. 228), the terms of the Union Agreement (Libelant's Exhibit 2), the conflicting evidence on the terms of the hiring, the conflicting evidence on the value and extent of the Moshers' work and the conflicting evidence on the termination of the agreement.

Point III

Where the Trial Court's Findings and Conclusions are amply supported by the evidence, the case should be affirmed.

Where the trial judge saw all of the witnesses, heard their testimony and had an opportunity of passing upon their credibility and accuracy, his Findings of Fact and Conclusions of Law should not be disturbed.

This is a familiar proposition of law which requires little citation and is peculiarly applicable to this appeal. The cases are uniform that a Finding of Fact in admiralty is a finality unless "clearly erroneous". Among the recent decisions of this Court upon that point are *United States v. Wilhite* (C.C.A. 9, 1947), 163 F. (2d) 825; *Vileski v. Pacific Atlantic Steamship Company* (C.C.A. 9, 1947), 163 F. (2d) 553; *Rogers v. Pacific Atlantic Steamship Company* (C.C.A. 9, 1948), 170 F. (2d) 30. See also, *Petterson Lighterage & Towing Corporation v. N. Y. Central Railway Company* (C.C.A. 2, 1942), 126 F. (2d) 992.

The libelant has argued the evidence produced at the trial in the major portion of his brief. As has been pointed out above, the evidence was conflicting. All of the testimony was presented orally to the Trial Court, with the usual opportunity to observe the demeanor of the parties and witnesses. Clearly under the foregoing decisions this is a case which should be affirmed.

CONCLUSION

Appellees respectfully urge that the judgment and decree of the District Court be affirmed. The evidence is ample and satisfactory that the work performed by the appellant and his assignors was of the reasonable value of $288.00, as found by the Court. The Trial Court was right; it should be affirmed.

Respectfully submitted,

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